



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** National Steel and Shipbuilding Company

**File:** B-254394

**Date:** November 24, 1993

Grant L. Clark, Esq., McKenna & Cuneo, for the protester.  
Joseph P. Grassi, Esq., and Stephen J. Wenderoth, Esq.,  
Department of the Navy, for the agency.  
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

1. Protest alleging that the clause in a solicitation for repair of a naval vessel instructing prospective bidders to consider that all paint on board the naval vessel contains lead conflicts with work item's estimate of the amount of lead-containing paint expected to be generated during the performance of the contract is denied where a reasonable reading of the solicitation shows that no such conflict exists.

2. Protest that the Navy's statutory obligation to identify and quantify the hazardous waste expected to be generated during the performance of a ship repair contract includes the duty to identify the specific location or distribution of lead-containing paint is denied where the statute does not compel this conclusion.

### DECISION

National Steel and Shipbuilding Company (NASSCO) protests the terms of invitation for bids (IFB) No. N62791-93-B-0082, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for the repair and overhaul of the Navy ship U.S.S. Mahlon S. Tisdale. NASSCO argues that the Navy has not met its statutory obligation to identify and quantify the hazardous waste expected to be generated during the performance of the contract.<sup>1</sup>

<sup>1</sup>NASSCO also protested, on the same grounds, the solicitations for the repair and overhaul of two other ships. See B-254410 and B-254420. However, prior to the  
(continued...)

We deny the protest.

The IFB was issued on June 25, 1993, and contemplated award of a firm, fixed-price contract for various repairs and alterations of the Tisdale, an Oliver Hazard Perry class guided missile frigate. The required repairs and alterations were described in numerous work items incorporated within the solicitation; several of these work items required the successful contractor to remove paint from various parts of the ship in accordance with standard item No. 009-32, "Paint Removal." The solicitation instructed prospective bidders that the Tisdale would be available for inspection at Naval Station San Diego from July 6 to July 13.

The IFB also included NAVSEA standard work item No. 077-01-001, "Hazardous Waste Produced on Naval Vessels; handling and disposal." This work item required the successful contractor to remove, handle, store, transport, and dispose of all hazardous waste identified within the work item, and referenced 10 U.S.C. § 1311 (Supp. III 1991), a statute which places upon the Navy the burden of identifying and quantifying the hazardous wastes expected to be generated during the performance of work on naval vessels. In the space designated for the quantification of any lead-containing paint expected to be produced as hazardous waste during the repairs and alterations, work item No. 077-01-001 listed "0".<sup>2</sup>

Amendment No. 0002, issued on July 12, added clause C-25, "Paint Containing Lead," which provides: "[c]onsider all paint on naval vessels to contain lead and/or chromate unless it can be established otherwise by laboratory analysis."

Amendment No. 0005, issued on July 23, revised work item No. 077-01-001 to reflect the expectation that 100 pounds of lead-containing paint would be generated as hazardous waste by the successful contractor. Amendment No. 0006, issued on July 28, increased that amount to 100 pounds/5 gallons.

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<sup>1</sup>(...continued)

due date for submission of the agency's reports on all of these protests, NASSCO and the Navy came to an agreement whereby all claims would be raised in one protest, and the other two protests were withdrawn.

<sup>2</sup>While lead-containing paints are at issue in this protest, the space designated for the quantification of lead-containing paints also includes paints which may contain cadmium or chrome.

NASSCO filed an agency-level protest on July 29, arguing that clause C-25 was inconsistent with both the Navy's statutory obligations under 10 U.S.C. § 7311 and with the terms of work item No. 077-01-001. The contracting officer denied the protest, as he found that the Navy had complied with the statute's requirements, and that amendment No. 0009, issued on August 2, responded to the hazardous waste identification and quantification concerns presented in the protest. That amendment completely replaced work item No. 077-01-001; the pertinent change increased the expected amount of lead-containing paint to 1,000 pounds/15 gallons.

NASSCO was not satisfied with the agency's response and filed this protest in our Office on August 5, the extended bid opening day. Bid opening proceeded as scheduled, and on August 24 the agency determined that urgent and compelling conditions existed and made award to Continental Maritime, notwithstanding the protest. See 4 C.F.R. § 21.4(a) (1993).

NASSCO sets forth two bases for its argument that the Navy has failed to comply with its obligations under 10 U.S.C. § 7311 in this solicitation: (1) the solicitation's clause C-25 improperly conflicts with the hazardous waste disclosure in work item No. 077-01-001 concerning the quantification of lead-containing paint; and (2) the solicitation improperly fails to sufficiently identify the location or distribution of lead paint throughout the work areas.<sup>3</sup>

The statute at 10 U.S.C. § 7311 requires the Secretary of the Navy to ensure that each contract entered into for work on a naval vessel (other than new construction) includes a provision in which:

"the Navy identifies the types and amounts of hazardous wastes that are required to be removed by the contractor from the vessel, or that are expected to be generated, during the performance of work under the contract, with such identification by the Navy to be in a form sufficient to enable the contractor to comply with Federal and

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<sup>3</sup>In its initial protest, NASSCO also argued that the solicitation improperly failed to include sufficient information regarding the actual amount of hazardous waste expected to be generated during the performance of the contract, including removal material. The agency in its report responded to this issue, and NASSCO in its comments did not rebut the agency's response. We consider this issue to be abandoned by the protester and will not consider it. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

State laws and regulations on the removal, handling, storage, transportation, or disposal of hazardous waste." 10 U.S.C. § 7311(a)(1).

The Secretary of the Navy shall renegotiate such a contract if the contractor, during the performance of work under the contract, discovers hazardous wastes different in type or amount from those identified in the contract, where those hazardous wastes originated on, or resulted from material furnished by the government for, the naval vessel on which the work is being performed. 10 U.S.C. § 7311(b).

NASSCO first argues that clause C-25 "logically conflicts" with work item No. 077-01-001; while the clause directs prospective bidders to consider that all paint on board the ship contains lead, the work item states that performance of the repairs and alterations required under the solicitation is expected to produce, as hazardous waste, 1,000 pounds/15 gallons of lead-containing paint.

We do not think that these two provisions conflict. Under this solicitation, the successful contractor is required to perform an array of repair and maintenance tasks which are broken down into a number of work items. Several of these work items involve paint removal; for example, section 3.7 of work item No. 123-11-001, "Fuel Oil Tank; inspect, preserve and repair," requires the contractor to accomplish the requirements of standard item No. 009-23, "Paint Removal," on the fuel oil tanks. Clause C-25 identifies all paint on board the ship as lead-containing paint, thereby notifying bidders that any paint removal operations accomplished under the solicitation's work items should include the proper precautions for removing lead-containing paint.<sup>4</sup> Work item No. 077-01-001 does not conflict with this instruction; rather, it complements it by quantifying the amount of lead-containing paint that is expected to be generated as hazardous waste as a result of the performance of all of the solicitation's work items. As a result, we see no reason to object to the Navy's inclusion of both clause C-25 and work item No. 077-01-001 under this solicitation. See Bill Strong Enters., Inc., B-245619, Dec. 16, 1991, 91-2 CPD ¶ 546.

In a related argument, NASSCO complains that clause C-25's "blanket statement" is objectionable as a matter of law, citing Metal Trades, Inc. v. United States, 810 F. Supp. 689 (D.S.C. 1992).

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<sup>4</sup>The Navy states, and the protester does not dispute, that the purpose of clause C-25 is to insure compliance with Occupational Safety and Health Act requirements for the removal of hazardous material.

Metal Trades involved a contract for the repair and maintenance of a U.S. naval vessel, portions of which required the contractor to replace the vessel's fire pump and soot blower piping. In the course of these replacements, asbestos-containing insulation and lagging material were encountered. The presence of asbestos necessitated special removal and disposal techniques, and the contractor was forced to modify upwards the price of the subcontract under which the fire pumps and blower piping were replaced because of the added costs of removal and disposal. Citing 10 U.S.C. § 7311, the contractor sought an upward adjustment of its own contract price based on these increased costs, as the firm claimed it had not anticipated discovering asbestos.

The solicitation in Metal Trades did not specifically identify or quantify the amount of asbestos expected to be generated during performance of the contract. The only reference to the possible existence of asbestos was in the attached standard item for control of shipboard thermal insulating material which stated, in pertinent part: "[c]onsider insulation and lagging to be asbestos-based material" unless it can be established otherwise. The statute requires the Navy to both identify and quantify the type and amount of hazardous waste expected to be generated during the performance of the contract. The court found that there was "not quantification of asbestos prior to the contract award, and in light of this, § 7311 required renegotiation of the contract." Metal Trades, 810 F. Supp. 689, 694.<sup>5</sup>

The court in Metal Trades found that the general statement in that solicitation concerning the existence of asbestos was unenforceable because it assumed the existence of a hazardous waste instead of identifying it and quantifying it as required by the statute. Id. However, in addition to the general instruction to consider that all paint on board the Tisdale contains lead, this solicitation contains work item No. 077-01-001, which specifically identifies and quantifies lead-containing paint as a hazardous waste expected to be generated during the performance of the contract. As a result, the Navy here has not merely assumed

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<sup>5</sup>The claim had been denied by the Armed Services Board of Contract Appeals, which held that, while the Navy breached its statutory duty by failing to specify the actual quantity of asbestos, the standard item's general statement was sufficient to put the contractor on notice of the existence of asbestos, and the firm could not reasonably argue that it was surprised by the amount of asbestos actually found. Metal Trades, Inc., Armed Services Board of Contract Appeals No. 37428, Feb. 9, 1989, 89-2 BCA ¶ 21,701.

the existence of a hazardous waste. We see no reason to object to the Navy's use of clause C-25 in conjunction with other provisions that serve to identify and quantify the hazardous wastes expected to be generated during the performance of the contract.

NASSCO also argues that the statute implicitly requires the Navy to identify the specific location and distribution of lead-containing paint throughout the work areas. In essence, the protester contends that all of the paint to be removed under the solicitation does not contain lead because it asserts that use of lead paint on board U.S. naval vessels is declining. Since the cost of removing lead-containing paint is a direct function of the number of locations in which the paint is found, NASSCO argues, overbidding will result unless the Navy's duty to identify includes the duty to identify location.

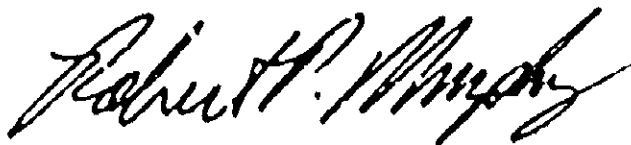
The statute requires the Navy to identify "the type" of hazardous waste in a form sufficient to enable to contractor to comply with laws and regulations on the removal and disposal of such waste. Here, work item No. 077-01-001 clearly identifies lead-containing paint as a type of hazardous waste expected to be generated, and clause C-25, when read in conjunction with the work items requiring paint removal, identifies the locations of the lead-containing paint. We think such identification is sufficient to meet the Navy's statutory obligation to identify hazardous wastes. Moreover, the Navy asserts, and the protester does not dispute, that lead paint on a ship's surface prior to removal is not a hazardous waste, but a material; even after removal, the resulting mix of paint chips and blast medium is waste only if it meets the toxicity thresholds of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq.

As for NASSCO's argument that overbidding will result unless the Navy is required to further specify the location of lead-containing paint, the Navy reports that the use of lead paint on board Navy vessels is not rare: ships' forces often perform unscheduled painting; the Navy supply system's inventory includes higher-lead paints; and current specifications call for low-lead paint--even paint with a low lead level can exceed the permissible exposure limit if removed improperly. The Navy also reports that, while testing may identify the lead content of paint exactly where tested, different results may be obtained inches away from where tested. As a result, the Navy asserts, it is more prudent to direct contractors to consider that lead paint will be encountered in all paint removal operations. The Navy concedes that while its approach significantly increases the cost of paint removal, it is the only means by

which the Navy can insure the safe removal of potentially hazardous material.

If the protester is correct, and knowledgeable firms will overprice, the Navy is simply accepting the risk that it may pay more for a safer operation, a position we find unobjectionable. Risks are inherent in procurements, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. See United Terex, Inc., B-245606, Jan. 16, 1992, 92-1 CPD ¶ 84. Although a procuring agency must provide sufficient detail in a solicitation to permit competition on a relatively equal basis, the solicitation need not be so detailed as to remove any uncertainty from the minds of prospective bidders or to eliminate every performance risk. J&J Maintenance, Inc., B-248915, Oct. 8, 1992, 92-2 CPD ¶ 232. Detailed specifications, in conjunction with on-site visits, ordinarily afford prospective offerors an adequate basis on which to compete intelligently. Bru Constr. Co., Inc., B-228206, Nov. 10, 1987, 87-2 CPD ¶ 476. There is no requirement that specifications be so exact as to obviate uncertainties and risk. Id. Based on our review of the record, we conclude that the agency has provided sufficient detail to allow competition on a relatively equal basis. J&J Maintenance, Inc., supra.

The protest is denied.

  
for James F. Hinchman  
General Counsel